

1 (The jury is present.)

2 THE COURT: Ladies and gentlemen, I'm sorry  
3 we consumed the time that way, but it was necessary to  
4 get some of these things sorted out.

5 Taking these in various orders, how many  
6 orders to compel were ignored regarding discovery  
7 document production? I think the appropriate thing to  
8 do here is for you-all just to get that out of the  
9 case and just disregard the question and the answer.  
10 There was some information requested. There was some  
11 information provided. There was some information that  
12 was not provided, but in the bottom line, it appears  
13 there was some misunderstandings about what was  
14 thought to have been provided. And so whatever  
15 happened procedurally before now is just something  
16 that needs not be something to be considered as part  
17 of the case at all. So just forget about that.

18 The first question is: Is there a duty or a  
19 requirement for a defendant to perform a due diligence  
20 search for patents on products, services, etc., before  
21 the entity markets and sells their respective product  
22 or services?

23 That is something that I will take up with  
24 the lawyers later, and if an instruction on it is  
25 appropriate, I'll give it to you in the final

1 instructions.

2           The next question is: Why didn't Lawson file  
3 for a patent on its S3 system? Can it be considered  
4 prior art if the patent has not expired?

5           We're not here dealing with Lawson's patents,  
6 and so that is really not a matter you-all need to  
7 concern yourselves with.

8           The first question and part of No. 3 is: Can  
9 one contact the Patent Office for existing patents  
10 (search)?

11           Do you remember from the video that said that  
12 once a patent, when it's filed, it remains  
13 confidential until -- all of the application remains  
14 confidential, but once the patent is actually issued  
15 by the Patent Office, the whole file is open and  
16 available to anybody in the public to look at, period.

17           The next question is: Who decides if a  
18 patent is valid?

19           I think they tried to deal with this in the  
20 video that you saw. In the first instance, the Patent  
21 and Trademark Office issues a patent. And if there is  
22 a dispute about the validity of a patent in a lawsuit,  
23 it's the jury that decides the issue of whether a  
24 patent is valid.

25           Now, this part of our case has been involved

1 with the claims of ePlus that Lawson infringed the  
2 patent.

3 The issues about invalidity come up in the  
4 next part of the case. And it's going to be ePlus'  
5 burden to prove by a preponderance of the evidence  
6 that there was infringement. It is Lawson's burden to  
7 prove by clear and convincing evidence that the patent  
8 is invalid. And you'll hear evidence that's related  
9 to that a little bit later on.

10 EPlus is getting ready to read you some  
11 stipulations. And with that, they'll rest and then  
12 ePlus will come forward.

13 The next question is: Is the U.S. Patent  
14 Office notified and their opinions sought if the  
15 validity of a patent is questioned?

16 That part of patent law to the extent there  
17 is any on that doesn't really concern us at this part  
18 of the case. So it's not anything that you need to be  
19 concerned with in this case, and I think that's the  
20 way we'll leave it.

21 So with those questions answered, we'll now  
22 let Mr. Robertson proceed.

23 MR. ROBERTSON: Thank you, Your Honor. Does  
24 Your Honor want to provide an instruction to the  
25 jury with respect to --

1 THE COURT: Do you want face the jury?

2 MR. ROBERTSON: I'm sorry, yes. -- what a  
3 stipulated fact is?

4 THE CLERK: Mr. Langford, can you move the  
5 lectern?

6 THE COURT: He can just do it from there.

7 Mr. Robertson is going to read to you what  
8 are called stipulations of fact. When the lawyers and  
9 the parties on each side stipulate that something is  
10 true, you can accept it as fact, as proved. It's not  
11 anything that there will be any evidence on. And so  
12 they are stipulating now that certain facts are true  
13 and have been approved or do not need to be proved.

14 All right. Mr. Robertson, would you like  
15 to -- and a copy of these stipulations will be made  
16 available for you in the jury room. You'll have  
17 those, too.

18 MR. ROBERTSON: Thank you, Your Honor. May I  
19 proceed?

20 THE COURT: Please.

21 MR. ROBERTSON: EPlus is the lawful assignee  
22 of all rights, title, and interest in and to the '683,  
23 '516, and '172 patents, collectively the  
24 patents-in-suit. The patents-in-suit were assigned to  
25 ePlus on May 15, 2001.

1           United States patent No. 5,712,989, the '989  
2     patent, was incorporated by reference into the  
3     disclosure of the patents-in-suit and shares two of  
4     four inventors with the patents-in-suit.

5           Lawson makes, uses, licenses, sells or offers  
6     for sale in the United States software applications  
7     and services including a software product line known  
8     as S3.

9           Included in the Lawson S3 product line is a  
10    suite of applications and modules referred to as the  
11    S3 supply chain management. These software  
12    applications and modules include inventory control,  
13    requisitions, purchase order, Lawson EDI, requisitions  
14    self service, and Punchout procurement.

15          The current version of the Lawson S3 software  
16    suite is release 9.0.1. Lawson makes technical  
17    documentations available to its licensees of its S3  
18    product through its "mylawson.com" website, including  
19    installation guides, implementation guides,  
20    configuration guides, release notes, and other  
21    documentation.

22          That's it, Your Honor.

23          THE COURT: All right. And with that?

24          MR. ROBERTSON: Sorry. Thank you. And with  
25    that, the plaintiff rests, Your Honor.

1 THE COURT: All right. Thank you.

2 Mr. McDonald, a couple of times during the  
3 day, I guess I've gone off course. I've referred to  
4 Mr. McDonald and renamed him as Mr. McDaniel, but it's  
5 really Mr. McDonald.

6 MR. McDONALD: As long as my first name isn't  
7 Ronald, I guess that works.

8 I call Richard Lawson to the stand.

9 THE COURT: All right. Mr. Lawson.

10

11 RICHARD LAWSON, called by the Defendant, first  
12 being duly sworn, testified as follows:

13

14 DIRECT EXAMINATION

15 BY MR. McDONALD:

16 Q Good afternoon, Mr. Lawson.

17 A Good afternoon.

18 Q Can you state your full name, please?

19 A My legal name is Herbert Richard Lawson, Jr. My  
20 dad went by Herbert, so I go by Richard Lawson.

21 THE COURT: Mr. Lawson, will you come back  
22 over this way and get that mic a little closer to you.  
23 Just move the chair back this way a little bit.

24 There you go. Then pull the mic -- there you  
25 go. I think it will pick you up.

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1 THE WITNESS: I have a problem with my voice  
2 trailing off.

3 THE COURT: There we go. And talk a little  
4 bit away from the mic. All right.

5 BY MR. McDONALD:

6 Q Mr. Lawson, is it more than just coincidence that  
7 your name is Lawson and this case also involves a  
8 company called Lawson Software?

9 A No, I started the company.

10 Q Did you just start it by yourself?

11 A Yes, I did.

12 Q At some point did any other Lawsons join you?

13 A Yes. After one year of being in the company by  
14 myself, my brother joined the company.

15 Q When was that?

16 A Bill Lawson. It would have been in 1976. I was  
17 '75.

18 Q I'd like to talk to you today about three basic  
19 things. One is the background of Lawson Software.  
20 Two is Lawson's competitors. And three is some issues  
21 relating to the process of developing the Lawson  
22 systems that are accused of infringement in this case.  
23 All right.

24 So if we had turn first to the background of the  
25 company, where did you form Lawson Software? Where

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1 was that?

2 A Minneapolis, Minnesota.

3 Q What type of company was it when you formed it?

4 A It was a -- we called it a contract programming  
5 company, which today I think they use the word  
6 "professional services" a lot. In other words, I sold  
7 my time as a temporary employee to companies.

8 Q Did you have some prior experiences that enabled  
9 you to start a business in this area?

10 A Yes, I worked seven years for a company called  
11 Analysts International Corporation out of Minnesota.  
12 They are actually still -- they are a partner of ours  
13 now. So I worked seven years with them.

14 Q What did you do for Analysts International?

15 A I did contract programming. In other words, I  
16 worked for them, but they would actually contract me  
17 out to other companies. Companies such as Control  
18 Data, which is where I started as my first contract.

19 Q So when you say "contract," can you be a little  
20 bit more specific about what your job duties actually  
21 were as a contractor?

22 A To walk into that company and do what they wanted  
23 me to do in terms of programming. So at Control Data  
24 I was a systems programmer working on the operating  
25 system.



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1 Q What years were you working at Control Data?

2 A The years at Control Data were split up a lot.

3 The first three years was at Control Data.

4 Q Which years were they?

5 A I'm sorry. 1968 through -- I'm sorry. Yes, '68

6 through '69 was Control Data in Minneapolis. And the

7 next two to three years was in Sunnyvale, California,

8 because Control Data opened up an office out there and

9 wanted us to go out there with them.

10 Q What types of functions did the software do that

11 you were involved with at Control Data?

12 A Actually, I ran the operating system on the

13 Control Data 6500, a dual processing machine.

14 Q What sort of stuff would that computer do?

15 A Read tape drives, read disks. It was the

16 operating system itself. It would be like the Windows

17 operating system but for a super computer.

18 Q Were there particular applications that that

19 computer was used for?

20 A Well, it was a super computer that was used by

21 scientists and by the government for all sorts of

22 applications, but I worked on the operating system,

23 the foundation that allowed those applications to run.

24 Q Before you got to Analysts International, did you

25 get some educational background that would be relevant

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1 to computers?

2 A Yes.

3 Q What education did you get?

4 A Well, in 1962 through '66 I attended Oklahoma  
5 Christian College, which is now Oklahoma Christian  
6 University in Oklahoma City. And I got a math degree  
7 because back then they didn't really have computer  
8 science degrees.

9 I went to Perdue University for '67 through '68  
10 and got a Master's Degree in Computer Science.

11 Q How was it that you wound up at Perdue?

12 A My brother-in-law. My brother-in-law was early  
13 into the computer business. He was working -- he was  
14 head of the department at the University of Minnesota,  
15 and I had worked at Univac, one of the early computer  
16 companies for many years, and he advised me to go to  
17 graduate school, and helped me through the process,  
18 and we looked at three universities; Perdue, Stamford,  
19 and University of Waterloo because they actually had a  
20 computer science department so that you could get a  
21 computer degree through the actual computer science  
22 department. And I chose Perdue.

23 Q So when you started Lawson, your company, what did  
24 you call it first?

25 A Lawson Associates.

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1 Q Did you actually have any associates at that  
2 point?

3 A No, but just in case I did, I figured I'd put  
4 Associates on there.

5 Q Can you tell me what sort of customers you worked  
6 for initially?

7 A The first customer I worked for was actually an  
8 insurance company. They were going to have a  
9 three-year project that I thought I would have, and,  
10 of course, that lasted three months until they  
11 canceled the project. And I had to start finding  
12 another one. So I worked for FMC Corporation, which  
13 is out of Minneapolis, Minnesota. And in that  
14 capacity, I was actually coding an inventory system  
15 that they had designed.

16 Q Now, are you familiar with the term "turnkey  
17 system"?

18 A Yes.

19 Q What is a turnkey system?

20 A First of all, I was doing contract work, which is  
21 to me it would be like a temporary employee. Instead  
22 of hiring an employee, they had contractors.

23 When my brother came aboard, which would be in  
24 '76, he really liked to work with small businesses.  
25 His background is -- my background is technical and

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1 engineering. His background was in business.

2 So he liked to go into small businesses, find out  
3 what their needs were, and program specific systems  
4 for them. And then after he programmed them, he would  
5 turn them over, hence the term "turnkey," and walk  
6 away. So it was not a package system. It was a very  
7 specific system built specifically for that customer.

8 So we did a lot of that in the early years, too,  
9 because when my brother came aboard, he would go to  
10 those small companies, and we would actually code and  
11 write turnkey systems.

12 Q So you say you'd walk away, that sounds like  
13 you're leaving your customers high and dry. Can you  
14 explain what you mean by that?

15 A Well, if they had problems with the software after  
16 we left or if they wanted new features or  
17 functionalities, they could call us back in. And,  
18 again, we would charge them for that. But we didn't  
19 run the software, and we didn't have upgrades to it.  
20 We didn't sell it as a package and have a package  
21 solution for them. We didn't have a phone line that  
22 they could call and say, I have a problem. Tell us  
23 what it was, and I would patch it for them.

24 THE WITNESS: I'm sorry. Too loud.

25 THE COURT: No, that's not the problem.

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1 THE WITNESS: Okay.

2 THE COURT: We have finally determined what  
3 the problem is that makes the system go pop when you  
4 use Ps and Ts. It's not everybody, but many people we  
5 have this problem with. That little section on the  
6 front there is too small, and they have ordered and  
7 are going to install by the end of this week bigger  
8 mics such as they use when people are singing songs.  
9 So we'll be able to have a performance here free of  
10 popping.

11 In the meantime, you just go ahead and talk  
12 and don't worry about it. The jury and the rest of us  
13 will deal with that, but it's nothing you're doing  
14 wrong. It's just the way some people talk. It  
15 happens and that's just the way it is.

16 THE WITNESS: Rest assured I will not sing  
17 anyway.

18 THE COURT: We won't call upon you to do  
19 that.

20 BY MR. McDONALD:

21 Q This was back in the '70s that you're talking  
22 about so far, Mr. Lawson?

23 A Yes.

24 Q So along the way, if we could kind of pick up the  
25 pace here a little bit. At least get to the late '70s

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1 or into the '80s. Did you start adding people or not?

2 A Yes, we did. As we took on more contracts, we had  
3 to make a decision. First of all, two more people  
4 were added as partners after that time frame. A very  
5 good friend of mine that worked with me at Control  
6 Data, he was a Control Data employee, but we knew each  
7 other. John Cirillo became a third partner.

8 Then my brother met a guy named Jerry Snyder out  
9 selling small business solutions. He came aboard. So  
10 there was four of us.

11 Q Why did you have those people?

12 A Because they complemented -- first of all, when  
13 you're out there on your own doing contracting,  
14 sometimes you might have to turn work down because  
15 it's only you. And you hate to turn work down because  
16 you like the business. But also because my brother  
17 and John -- I'm sorry. John and I were technical. We  
18 did contract programming, hourly rate programming, on  
19 contracts with companies like Control Data, big  
20 companies. It kept a nice cash flow coming into the  
21 company.

22 Bill and Jerry would go out and bid on and sell  
23 these turnkey projects. And, of course, if they sold  
24 more than one or two we needed programmers to do  
25 those. So we had to make a decision either to turn

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1 business down or to actually hire employees to satisfy  
2 the business that we were getting. And we decided to  
3 add employees for that.

4 Q At some point in the process did you reevaluate  
5 whether you wanted to keep doing these customized  
6 turnkey systems?

7 A Yes.

8 Q When was that?

9 A What happened was every time we went into -- it  
10 would be about '77. We went into these companies, and  
11 the first thing we found out is first of all the  
12 company normally wanted what we would call the  
13 operational software. They wanted software for order  
14 entry.

15 Q Just keep it generic at this point.

16 A Well, what we found out is they would then say --  
17 We were always bidding the same modules. Financials.  
18 And we'd have to charge them a from scratch price to  
19 code that module. Some of those modules were the same  
20 from company to company. So we decided to build what  
21 we call today what is known as shell packages. They  
22 were complete packages, but they didn't have a lot of  
23 bells and whistles on them.

24 So we could go into a company and bid those at a  
25 much lesser price. We'd bid them as a small price for

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1 the software and then whatever it took to modify them  
2 for their specific needs.

3 Q So what did you call those products then?

4 A They became our off-the-shelf beginning projects.  
5 I'm sorry. Beginning modules that would keep the  
6 price down.

7 Q Approximately when was that then?

8 A '77, '78.

9 Q So getting into the '80s now, did the company  
10 start to grow at any point?

11 A Yes, I like to joke with sales people that we made  
12 a mistake and hired a salesman. And the salesmen not  
13 only helped us get local business, but they helped us  
14 get these packages, which were on Burrell machines.  
15 Back in those days, you actually sold packages  
16 typically by hardware. It's a different world today,  
17 but you niched out the hardware.

18 We niched with Burrell's hardware. And the  
19 Burrells did not have very many software packages that  
20 they could buy from, that Burrell's customers could  
21 buy from.

22 So he actually went to California, the salesman,  
23 and started selling packages in California. And that  
24 put us in a different world because we had to have  
25 phone support. We had to have our own hardware. We



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1 had to have a real office, and we had to have support  
2 personnel.

3 Q So that basic business model, using the modules  
4 that you would describe it as --

5 A Yes.

6 Q -- how long did that will continue with that  
7 particular business model?

8 A The model I just described?

9 Q Yes.

10 A To this day it's continued. That's who we became.  
11 And at some point you asked when did we change to that  
12 model. About 1983, 2 or 3, our fourth partner, Jerry  
13 Snyder, decided he wanted to go a different way than  
14 us, and he took all the contract. We agreed. He took  
15 all the contract programmers that we had in  
16 Minneapolis, about 70 or 80 people, and started his  
17 own contracting business, professional services  
18 business.

19 And what we were left with after that was the  
20 package software plus the modification of that  
21 software. So we got out of the generalized  
22 contracting business at that point.

23 Q What is your current position with Lawson  
24 Software?

25 A I'm cochairman of the board.

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1 Q How long have you had that position?

2 A Cochairman for five years, but I've been the  
3 chairman ever since the company was founded.

4 Q About five years ago did your position -- did you  
5 have a different position than before you became  
6 cochairman?

7 A In the company itself I had various positions. I  
8 had chief technology officer and at various points in  
9 times I was CEO.

10 Q At various points in times, you mean basically  
11 between the '80s and about 2007?

12 A Between '75 and that point, yes.

13 Q At some point did Lawson Software go public?

14 A Went public in 2001, yes.

15 Q Let's now talk about the processes that you use to  
16 develop the systems that are accused in this case.  
17 I'd like you to answer these questions in terms of the  
18 purchase order module, the requisition module, and the  
19 inventory control module. All right?

20 MR. ROBERTSON: Can I just have some  
21 clarification, Your Honor, of what we're talking about  
22 when we're saying the product accused in this case?  
23 As Your Honor understands, there's an order that you  
24 have given defining the scope of this gentleman's  
25 testimony. So I want to make sure we're talking about

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1 a product that's accused, which is 2003 S3  
2 procurement.

3 BY MR. McDONALD:

4 Q Let's clarify that, Mr. Lawson. We'll talk about  
5 the systems, those three types of modules that I just  
6 talked about from the year 2003. All right? And  
7 forward.

8 So with respect to those products did you have  
9 some role in developing those products?

10 A Yes. Well, the products themselves, the answer is  
11 in one sense no except that the technology beneath  
12 those applications I had roles in. Well, since 2003,  
13 the answer is, since I left, the answer, that would be  
14 basically no. Before that, yes.

15 THE COURT: That's enough.

16 MR. ROBERTSON: I object to anything before  
17 2003.

18 THE COURT: We've had a ruling on this,  
19 haven't we? And all you're going to do is talk about  
20 the way things are, the general process of development  
21 of something. Not the birth plan of it all.

22 MR. McDONALD: Understood.

23 THE COURT: And I want you to stay there, and  
24 you do that by asking very focused questions, to which  
25 Mr. Robertson will not object as leading, will he?

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1 MR. ROBERTSON: If they are focused and not  
2 leading, Your Honor.

3 THE COURT: No. If they are leading because  
4 that's the way he's focusing the interrogation, then  
5 the leading question objection is gone. So go you try  
6 it and get us there.

7 BY MR. McDONALD:

8 Q Now, Mr. Lawson, is there a kind of a generic  
9 process that the company goes through in terms of  
10 deciding whether to add features to these products  
11 like the three modules I've talked about since 2003?

12 A Yes.

13 Q Can you tell me step by step what that process is?

14 A The process or the information we gather to figure  
15 out what we want to do comes from lots of sources.  
16 One is our own clients who'll give us feedback on  
17 what features or functionality they would like to see  
18 in our software.

19 And in fact, we have user groups that actually  
20 accumulate those features and actually whittle them up  
21 into the company and say, These are the most important  
22 features that --

23 MR. ROBERTSON: Your Honor, can we just have  
24 some clarity whether Mr. Lawson was involved in this  
25 process from 2003 forward? So I'd object. There's no

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1 foundation.

2 BY MR. McDONALD:

3 Q Mr. Lawson, have you been involved in that type of  
4 a process since 2003?

5 A No, but I'm very aware of them, but I haven't been  
6 specifically in the room dealing with it.

7 MR. ROBERTSON: Then I would move to strike,  
8 Your Honor.

9 THE COURT: I thought he was there when it  
10 was going on.

11 MR. ROBERTSON: 2003 he just testified he  
12 wasn't involved in the process.

13 THE COURT: He said he wasn't doing it. He  
14 said he was in the room while it was going on.

15 Did I misunderstand, Mr. Lawson?

16 THE WITNESS: As my role, when we go to user  
17 exchanges and so forth, I get into some rooms where  
18 people talk about these issues. So I'm involved not  
19 on a day by day basis, but I'm very aware of the  
20 process.

21 THE COURT: Okay. Overruled.

22 BY MR. McDONALD:

23 Q So when you say "user groups," can you tell me  
24 what a user group is?

25 A Well, on a national level, it's all of our clients

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1 are invited once a year to what's called a user group.  
2 And on a local basis, user groups are formed, which  
3 are run by local clients of ours, and sometimes  
4 Lawson's people will attend and sometimes we don't,  
5 depending on if they ask us to.

6 And it's those user groups, and there's a national  
7 user group, that will ask for features and  
8 functionalities they want to see in our software, and  
9 they then will actually decide what they want to  
10 present to Lawson to say, We would like to see these  
11 features. That's one area that we get feedback.  
12 There's other areas, but that's one area.

13 Q What other ways did you get that type of feedback?

14 A Well, our own installers, if you will, or our own  
15 consultants that go out to see a client and help  
16 install our current software. They'll notice the  
17 business practice of these companies and what we might  
18 be able to do in our software to address things we  
19 haven't addressed or to change things we have  
20 addressed to work differently.

21 So our own consultants will come back to us and  
22 say, This is a list of things we see that would be  
23 nice to add in the next release.

24 Software is constantly being released. There's  
25 release numbers and that feeds a product marking group

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1 that makes a decision on what to put into the next  
2 release.

3 Q So once you get this feedback, is there another  
4 step in the process that relates to adding  
5 functionality to the specific products we're talking  
6 about?

7 A After we get all the feedback, it's up to the  
8 product marketing group to mix all that together and  
9 look at it, and say these are the important features  
10 that seem to affect most of our clients, and  
11 therefore, we'll put those into the software for the  
12 next release.

13 Q Is there any sort of a review as to the technical  
14 feasibility of those proposed new features?

15 A Certainly. The end product development will get  
16 involved and talk about how long it might take to do  
17 such a feature and work that into whatever schedule  
18 the next release should be. And some things might be  
19 delayed because they will take longer to get into the  
20 software.

21 Q Are you familiar with the term "reverse  
22 engineering"?

23 A Yes.

24 Q What's your understanding as to what that means?

25 A Reverse engineering would be, for example, taking

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1 a car apart and undoing it and seeing all the pieces  
2 and components of it and finding out what's in it.

3 In software, it would be to grab somebody's  
4 product, let's say, or whatever, and look at it or  
5 take it apart to try to see what was inside.

6 Q Have you personally been involved in any sort of  
7 reverse engineering at Lawson Software?

8 A No.

9 Q What is your philosophy about reverse engineering?

10 MR. ROBERTSON: Objection, Your Honor.  
11 Relevance.

12 THE COURT: Is there an issue about reverse  
13 engineering in this case? I didn't hear any. I  
14 didn't hear any testimony about it so far. I'm not  
15 sure why it's relevant. Besides that, he just  
16 testified that he doesn't do it. He hasn't testified  
17 that the company does or doesn't.

18 So why are we getting into that?

19 MR. McDONALD: That's within the scope of  
20 what we're permitted to ask about. So that's why.

21 MR. ROBERTSON: It still doesn't make it  
22 relevant to the issues in the case. Mr. Lawson can  
23 speak for himself. Personally, I don't think he can  
24 speak for all 3900 employees of Lawson.

25 THE COURT: Well, I'm not sure why -- I mean,



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1 we haven't had any charge that there's been reverse  
2 engineering in the case that I know of. So I think  
3 he's right.

4 BY MR. McDONALD:

5 Q Mr. Lawson, have you ever seen any software  
6 products from any companies called ePlus, Fisher or  
7 ProcureNet?

8 A No.

9 Q I'd like to turn now to the topic of competitors  
10 of Lawson. Do you have familiarity with who Lawson's  
11 competitors are?

12 A The main competitors, yes.

13 Q How do you have that familiarity?

14 A Well, over the years and from the board today we  
15 get competitive analysis and see who our competitors  
16 are, but we also know who we're competing with on  
17 typically a constant basis.

18 Q Based on that understanding -- how many years have  
19 you had that understanding?

20 A Thirty years.

21 Q Based on that understanding, do you consider ePlus  
22 to be a competitor?

23 A No.

24 MR. McDONALD: I have no further questions.

25

1 CROSS-EXAMINATION

2 BY MR. ROBERTSON:

3 Q Mr. Lawson, you reside in Dallas, Texas; is that  
4 right?

5 A Yes, I do.

6 Q And the headquarters for Lawson is in St. Paul,  
7 Minneapolis?

8 A Yes.

9 Q So you don't fly there on a daily basis, do you,  
10 sir?

11 A No, I do not.

12 Q So it's fair to say you haven't been involved in  
13 the day-to-day operations of the company for quite  
14 sometime; is that right?

15 A Since we went public -- I have been retired for  
16 five years.

17 Q Retired for five years?

18 A Yes.

19 Q So since 2005?

20 A Yes.

21 Q Since this lawsuit has been filed, have you had an  
22 opportunity to go out and investigate some of the  
23 product offerings of ePlus?

24 A I'm sorry?

25 Q Since this lawsuit was filed, sir, approximately

LAWSON - CROSS

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1 in May of 2009, have you had an opportunity to go and  
2 look at some of the product offerings of ePlus?

3 A No.

4 Q So you didn't even go and investigate that to see  
5 what kind of products ePlus was offering in the  
6 marketplace?

7 A No.

8 Q And in your deposition you acknowledge that you  
9 haven't been keeping up with the latest products of  
10 Lawson; isn't that right?

11 A In the last five years, that's correct.

12 MR. ROBERTSON: Thank you. I have no further  
13 questions. Have a safe trip back.

14

15 REDIRECT EXAMINATION

16 BY MR. McDONALD:

17 Q Mr. Lawson, since you retired, what role have you  
18 had with Lawson?

19 A Cochairman.

20 Q What duties do you have as a cochairman?

21 A Obviously, like any other chairman or like anybody  
22 on the board, I have responsibility to look at the  
23 strategic direction of Lawson and also the performance  
24 of Lawson on a quarterly basis.

25 Q Do you go to board meetings?

LAWSON - REDIRECT

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1 A Yes, I do.

2 Q Do you go to other meetings?

3 A Typically, board meetings and strategy meetings  
4 that the board is involved with.

5 Q These are strategy meetings between the board  
6 meetings?

7 A From the -- to the board meeting from management  
8 that we invite management to give us strategy.

9 THE COURT: What is that?

10 THE WITNESS: I'm sorry. Once a year we have  
11 a strategy meeting that management presents to the  
12 board our strategies. So it's a specific meeting to  
13 get the strategies from the company.

14 Q That's separate from the quarterly board meetings?

15 A Yes.

16 MR. McDONALD: I have no furthest questions.  
17 Thank you.

18 THE COURT: Can he be excused permanently?

19 MR. ROBERTSON: From my perspective, yes,  
20 sir.

21 MR. McDONALD: Yes, sir.

22 THE COURT: Mr. Lawson, thank you for being  
23 with us. You can stay in the court or you can go back  
24 to Texas if you can get an airplane that will get you  
25 there.

LAWSON - REDIRECT

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1 THE WITNESS: I have to go to a board meeting  
2 in Florida.

3 (The witness was excused from the witness  
4 stand.)

5 MR. McDONALD: Your Honor, our next witness  
6 is Mr. Christopherson. Some of these other issues  
7 relate to his testimony.

8 THE COURT: Ladies and gentlemen, I have to  
9 deal with another set of problems with the lawyers to  
10 try to make life better for you-all in the future.

11 So I think what we'll do is excuse you-all  
12 today and let you go home, and we'll start again at  
13 nine o'clock in the morning. And drive carefully.  
14 Thank you very much.

15 (The jury is out for the evening.)

16 THE COURT: All right. Do you have the  
17 transcript that I'm supposed to read that you all are  
18 supposed to agree on?

19 MR. McDONALD: I think the answer is yes,  
20 Your Honor.

21 MR. ROBERTSON: Yes.

22 THE COURT: We won't provide lunch tomorrow.  
23 The weather is going to be nice. They can get out and  
24 they won't feel like they're locked up.

25 I need to know first, just so -- I want the

1 record to be clear. What are we dealing with? Let's  
2 get that straight so we get the issue defined. And  
3 then we'll go from there.

4 MR. McDONALD: The issue, Your Honor, is what  
5 if anything do we do with the Court's definition of  
6 "catalog" and your proposed new definition of  
7 "catalog".

8 THE COURT: I'm just going to give an  
9 instruction to them, I think.

10 Can you give these back to them. All right  
11 now. You have given me something to read here.

12 MR. McDONALD: I think the main question that  
13 gave rise to providing the Court with a copy of the  
14 Markman transcript was is the definition that the  
15 Court had already given for a catalog, was that  
16 actually an agreed definition?

17 And I think the answer is going to be pretty  
18 clearly yes when you actually go through this  
19 transcript, Your Honor, and I think the most clear  
20 section of that is near the end of the transcript when  
21 you get around to page 133.

22 And the context of that is there was a  
23 discussion about "by a vendor," and whether that term  
24 was unduly narrow. And I had previously in the  
25 transcript that you'll see in various places here,

1 both sides actually had referred to column 4 of the  
2 patent, the '683 patent, which we've referred to at  
3 least once or twice during the course of the case here  
4 with the witnesses.

5           It talks about what's in that catalog  
6 database. And a list, I'll give the shorthand version  
7 of the paragraph, at column 4 of the '683 patent from  
8 lines 46 to 60. In essence, it says, A feature of the  
9 present invention is the ability to search multiple  
10 catalogs from different suppliers. Then it uses the  
11 phrase "published" a few times. It talks about  
12 published by a vendor distributor. It talks about  
13 published by some of the vendor manufacturers. And it  
14 talks about further contain catalogs published by  
15 outside suppliers whether other manufacturers or other  
16 distributors listing such vendors products different  
17 from those in the distributor's catalog. That's  
18 column 4.

19           And that was discussed at the hearing because  
20 when we had another definition, "published by a  
21 vendor" was what we had originally proposed,  
22 Mr. Robertson had raised some concerns that the word  
23 "vendor" was too restrictive. So we pulled out, both  
24 of us, pulled out that column 4 to say, Well, there's  
25 some other terms here. We want to make sure that the

1 term "vendor" isn't too restrictive and that we cover  
2 the distributors, the vendor manufacturers, the  
3 outside suppliers. Basically, everybody talked about  
4 in that column 4 section I just referred to.

5 So that was the context of this. And so if  
6 we go to page 133, for example, Mr. Robertson at line  
7 5 says, I think it should include all, Your Honor. I  
8 think it should include vendors, distributors,  
9 manufacturers, which are all listed there in that  
10 column 4.

11 Then the Court at line 8 said so, you're  
12 happy with this definition as long as it reads like  
13 the text in column 4; is that right?

14 Answer from Mr. Robertson: I think that's  
15 right, Your Honor. I'm trying to think if there's  
16 another example that's beyond a distributor, a vendor,  
17 a supplier, or a manufacturer that could be relevant.

18 THE COURT: What page are you on?

19 MR. McDONALD: 133 of the Markman.

20 THE COURT: This is the Markman hearing?

21 MR. McDONALD: That's correct. I already  
22 started reading from line 5, Your Honor. I was just  
23 at the point I think about line 12, after  
24 Mr. Robertson, "I think that's right, Your Honor."  
25 Where you asked if he'd be happy which the definition



1 as long as it reads like the text in column 4.

2 He said, "I'm trying to think if there's  
3 another example that's beyond a distributor, a vendor,  
4 a supplier, or a manufacturer that could be relevant,  
5 but I think if it's inclusive, it shouldn't be a  
6 problem."

7 Then the Court read further down in that  
8 column 4 a quote, "Catalog database can further  
9 contain catalogs published by outside suppliers  
10 whether other manufacturers or distributors listing  
11 such vendors products different from those in the  
12 distributors' catalogs."

13 The Court went on to say, Even that text  
14 connotes that the vendor, the word "suppliers" is  
15 intended to be a vender, doesn't it?

16 Answer from Mr. Robertson, "I think a  
17 supplier typically is a vendor. A distributor is a  
18 supplier of other vendor's goods."

19 Then the Court then went on to say on page  
20 134 now at line 3, "But, look. Catalog database can  
21 further contain catalogs published by outside  
22 suppliers. I'll leave out the whether clause for  
23 purposes of clarity for a moment, listing such  
24 vendor's products, etc." That such vendor's products  
25 means supplier in that context, does it not?

1           Answer from Mr. Robertson, "In that context,  
2   yes, it does."

3           Then the Court goes on at page 134, line 11,  
4   In adding back in the whether clause, it would be  
5   whether other manufacturers or distributors, they too  
6   could be considered vendors because they have  
7   previously been defined as vendor manufacturers and  
8   vendor distributors.

9           Finally, the punchline here at line 16 for  
10   Mr. Robertson, "I think you have solved the problem,  
11   Your Honor. Vendor is construed broadly to include  
12   all those types of suppliers of goods, all the  
13   sources."

14           "The Court: Then that takes care of the  
15   problem for both of you." And then the Court turned  
16   to me and said, "You agree with that, too, don't you?"  
17   And I answered on page 135, line 1, "That was our  
18   intent all along. That's why we chose the word  
19   "vendor" to grab all those.

20           And then the Court said, "But you just  
21   shortened it too much."

22           Then at line 8, Well, I mean in the  
23   presentation of it here. But in your actual  
24   presentation, you seem to go along with that notion,  
25   do you not?

1 I answered, "That's correct."

2 Then the Court said, "Okay. That's fine.  
3 That's good to get a feeling of accomplishment at the  
4 end of the day."

5 This is where we agreed on the definition,  
6 Your Honor, that a catalog as it is in the jury  
7 notebook is that organized collection of items and  
8 associated information published by a vendor, and then  
9 in parentheses we have the phrase "Which includes  
10 suppliers, manufacturers, and distributors,  
11 parentheses, which preferably includes a part number,  
12 a price, catalog number, vendor name, vendor ID, a  
13 textual description of the item, and images of or  
14 relating to the item."

15 So that establishes that the parties did  
16 agree on this definition. And I think --

17 THE COURT: If you look at page 136, it says,  
18 Mr. Robertson: If Your Honor says "vendor" is broad  
19 enough to include "manufacturer," then I think we have  
20 reached at least an agreement there.

21 MR. McDONALD: Right. You're right. I had  
22 that marked here, but I forgot to keep going after I  
23 saw the other language. That's at page 136, line 24,  
24 to page 137, line 1.

25 So there was this agreement on the meaning of

1 or the proper definition of "catalog," Your Honor.  
2 There's no dispute that as defined then the  
3 definition, the construction by the Court, does use  
4 terms in their plain and ordinary meaning.

5 And I think I heard even yesterday  
6 Mr. Robertson reemphasizing that that was their belief  
7 as well, that the terms of the Court's instruction,  
8 including the word "published," those are all words  
9 that are appropriate with their plain and ordinary  
10 meaning.

11 Of course, you could just keep defining and  
12 defining and defining. You could have another  
13 interpretation of another interpretation of a  
14 construction, but at some point you create more  
15 confusion rather than resolve issues.

16 This definition was agreed. It's got plain  
17 and ordinary words in it that a jury can understand.  
18 So we think it is appropriate as is and should not be  
19 altered in large part primarily because it's accurate,  
20 it's correct, it is proper in the context, and other  
21 parts of the Markman transcript you can see where I  
22 was talking about there are many things described in  
23 these patents that can be considered organized lists  
24 of item information that are not catalogs, like  
25 requisitions, and order lists, and purchase orders and

1 things like that, even something called a non-catalog,  
2 which is a cross-reference table.

3 Those things aren't catalogs. What's the  
4 difference? Well, those aren't published by a vendor.  
5 These are.

6 So the number one reason to stick with this  
7 definition is that the parties agreed to it.

8 No. 2 is that it's very correct. It's very  
9 consistent with the patents themselves. Furthermore,  
10 the experts and all the testimony in this case has  
11 been developed around these constructions in the case  
12 that are accurate and complete. And so I think we  
13 need a pretty compelling reason to do anything to  
14 monkey with them right now, and there just isn't one.

15 THE COURT: All right.

16 MR. McDONALD: Thank you.

17 MR. ROBERTSON: Thank you, Your Honor.

18 Your Honor, what was agreed to there and what  
19 the Court was focusing on was what is a vendor. And  
20 the Court identified in that particular dispute by  
21 looking at the patent that a vendor could be a  
22 distributor, a manufacturer or a supplier. And so  
23 included that in the definition.

24 The mischief that I was alerting the Court to  
25 at the time was this notion of "published," which I

1 think has quite really been realized now, Your Honor.  
2 They morphed a dispute over what a vendor was into now  
3 what publication means.

4 And as Your Honor has seen throughout the  
5 first half of the case, the argument now goes that  
6 "published" has some particularized meaning that the  
7 Court never gave it, such that, and when we raised  
8 this this morning, Your Honor, with respect to one of  
9 the demonstratives, the argument has been made that if  
10 a vendor provides information to a customer, and then  
11 the customer modifies it in some way, or the customer  
12 adds additional information to it, or the customer  
13 deletes some of the information but keeps the majority  
14 of the information or if it's reformatted or modified  
15 in any way, shape or form, that then no longer becomes  
16 a published by a vendor.

17 So it's the "published" where they really  
18 have imported and actually interpreted your claim  
19 construction not to have its ordinary meaning, but to  
20 basically create a noninfringement argument that they  
21 have now pressed.

22 THE COURT: Basically, as I see it, the  
23 argument by Lawson is that "published" means edited by  
24 the customer. The item master, it seems to me, is  
25 multiple catalogs in computerized format, and those

1 catalogs have an organized collection of items and  
2 associated information that includes preferably part  
3 numbers, prices, catalog numbers, vendor name, vendor  
4 ID, a textual description of the items and images of  
5 or relating to the item. That is published by a  
6 vendor but often edited by Lawson's customer. I mean,  
7 that's what this whole dispute seems to me to be  
8 about, isn't it?

9 MR. ROBERTSON: My position -- yes, Your  
10 Honor. My position is "edited by a customer" is  
11 irrelevant to the claim.

12 THE COURT: Your position is "edited" is not  
13 equivalent to "published," is that what you're saying?

14 MR. ROBERTSON: No.

15 THE COURT: No, that isn't your position?

16 MR. ROBERTSON: No, that's not my position,  
17 Your Honor.

18 Whether it's edited or not edited is  
19 irrelevant as to whether or not it satisfies your  
20 claim construction.

21 THE COURT: That's not the point. You're  
22 making the point that nobody called out published for  
23 definition. The fight was over and the argument was  
24 really over the meaning of the word "vendor," and that  
25 now that's all been changed. It's been changed

1 because of this. In item master, the customer can put  
2 different things in it themselves.

3 What does it do? It takes information that's  
4 in a catalog, in catalogs that vendors have that have  
5 been imported into the system in a particular format  
6 that can be accommodated by the way computers operate.  
7 And then edits some of that information to conform to  
8 Lawson's system. And the theory is that that changes  
9 what was a catalog into a non-catalog. Isn't that  
10 what their theory is?

11 MR. ROBERTSON: I think it changes from being  
12 published by a vendor, they would suggest, to not  
13 being published by a vendor with focus on the word  
14 "published."

15 THE COURT: So that means it doesn't satisfy  
16 the claim construction?

17 MR. ROBERTSON: Right. That's why I think  
18 there are two solutions in my view. As modified, the  
19 Court's instruction with respect to "published by a  
20 vendor," I think, solves that mischief or removal of  
21 "published by" and just say "from a vendor" or  
22 "available from a vendor," which includes suppliers,  
23 manufacturers and distributors is fine.

24 THE COURT: To a certain extent, I think  
25 you-all are the authors of your own misfortune. You



1 both inveighed the Court to do certain things. Lawson  
2 inveighed the Court to use "published by a vendor."  
3 There's support in the specification for that, but it  
4 was clear from the very beginning of the discussion at  
5 the Markman hearing that what we're really focusing on  
6 is the vendor, and it is proper to import some of the  
7 requirement from the specification into the claim  
8 construction, but the rule is the claims are given by  
9 the Court, and then all other terms that are not  
10 construed by the Court are given their ordinary and  
11 usual meaning to one of ordinary skill in the art;  
12 isn't that right?

13 MR. ROBERTSON: I think that is correct, Your  
14 Honor.

15 THE COURT: I think this is the instruction  
16 I'm going to give the jury. Published by a vendor as  
17 used in the definition of the claim term "catalog,  
18 product, or catalog," these words are to be given  
19 their ordinary meaning to one of ordinary skill in the  
20 art. Published simply means to make generally known  
21 or to disclose. Published by a vendor simply means  
22 that at some point in time before a user uses the  
23 invention, a vendor, such as a supplier, a  
24 manufacturer or distributor has made generally known  
25 or has disclosed an organized collection of items or

1 associated information preferably, but not  
2 necessarily, including a part number, price, catalog  
3 number, vendor name, vendor ID, a textual description  
4 of the item, and images of or relating to the item.  
5 Why doesn't that solve this problem?

6 MR. ROBERTSON: I think it fully solves that  
7 problem, Your Honor, and we have no objection to that  
8 instruction.

9 THE COURT: But I interrupted your argument.  
10 If you've got more points you want to make, go ahead  
11 and make them.

12 MR. ROBERTSON: The point I would like to  
13 make, Your Honor, is really it's Lawson who made the  
14 unilateral and independent and unsupported decision as  
15 part of their non-infringement strategy to construe  
16 the Court's instruction of "published."

17 It was a reconstruction of a construction,  
18 and no party, either plaintiff or defendant, has the  
19 right to rewrite the Court's construction to  
20 manufacturer, non-infringement or infringement  
21 positions, and that's what I think really happened.  
22 They took "published," and they imbued all of these  
23 connotations into it that they now are attempting to  
24 use beyond its ordinary meaning as the Court obviously  
25 intended it to happen, not some meaning that the data

1 could not be in any way either reformatted or  
2 redefined or --

3 THE COURT: Well, let me ask you this,  
4 though. I think you're beginning to digress some.

5 If this definition is used, isn't it still  
6 possible for Lawson to introduce evidence that the  
7 customers do things, and that, in fact, to one of  
8 ordinary skill in the art, what is done in using the  
9 Lawson system doesn't fit the claim definition?

10 MR. ROBERTSON: I don't think so, Your Honor.

11 THE COURT: With this instruction.

12 MR. ROBERTSON: If "published" simply means  
13 to make generally known or disclose, then how is it  
14 relevant at all that the data is reformed or not all  
15 of the data is included? If enough data is included  
16 to satisfy that it is the Court's claim  
17 construction -- excuse me. That it's an organized  
18 collection of items and associated information that is  
19 made generally known or disclosed by a vendor. Now  
20 I'm reading your construction into there. And that it  
21 preferably but not necessarily includes all of those  
22 requirements, or I guess they're not requirements, but  
23 includes things such as part number, price, catalog,  
24 number, etc., then it satisfies the definition of  
25 "catalog."

1           So to have all this inquiry into: Did the  
2 customer modify it? Did it take the description and  
3 reduce it to 32 characters?

4           THE COURT: What does it do? You're using  
5 too much information at the front end before you get  
6 to the operative verb in your presentation. Tell me.

7           MR. ROBERTSON: It introduces completely  
8 irrelevant information that has no bearing whatsoever  
9 on whether or not the Lawson catalog database is, in  
10 fact, or satisfies --

11          THE COURT: What if it's relevant to some  
12 extent?

13          MR. ROBERTSON: Under the Court's  
14 construction, I don't see how it could possibly be  
15 relevant if it simply means to make generally known or  
16 disclosed. How could reformatting the data in some  
17 way or who even selects the data to include? The  
18 Court's definition has nothing to do with who selects  
19 the data to put in the database. That's one of the  
20 arguments that's being made here, and it's the  
21 customer that selects at the data. The answer is:  
22 Who cares who selects the data.

23          THE COURT: Let me ask you something. Why  
24 did you object to DX 371, where Lawson proposed to  
25 define "published" as made generally known, publicly

1 announced or declared, which is one of the exhibits in  
2 the case that Lawson offered and you objected to?

3 MR. ROBERTSON: Well, first, I thought it was  
4 hearsay, Your Honor. And, secondly, I thought the  
5 jury doesn't need to get a definition in there. They  
6 should have their ordinary meaning of it.

7 If the Court's comfortable with that as the  
8 ordinary meaning --

9 THE COURT: Are you comfortable with it as  
10 the ordinary meaning to one of ordinary skill in the  
11 art?

12 MR. ROBERTSON: I am comfortable.

13 THE COURT: They are, too. They wanted DX  
14 371. That had the same basic definition in it.

15 MR. ROBERTSON: Then, Your Honor, I will  
16 withdraw my objection if you want to introduce that,  
17 but I think you have solved that problem by having  
18 this instruction. But the problem I have when I look  
19 at the demonstrative is that it wants to say all these  
20 things --

21 THE COURT: Wait a minute. Is that item  
22 information changes that you handed up this morning to  
23 me, is that the demonstrative you're talking about?

24 MR. ROBERTSON: Yes, sir. Now I'm looking  
25 for my copy. Yes. So if you see at the top, "Vendor

1 changes information to new electronic format and gives  
2 information to customer." Who cares if the vendor  
3 changes it in some way if it still is disclosed or  
4 made generally known? And then there's this next one,  
5 the customer.

6 Who selects it? The customer selects the  
7 desired items. What does that matter to the Court's  
8 claim constructions? Completely irreverent. The  
9 customer can add additional item information. So  
10 what?

11 The customer can delete item information.  
12 What does that matter? The customer can modify the  
13 item information. Totally irrelevant as long as it  
14 satisfies the Court's claim construction at the end of  
15 the day.

16 The fact that the customer loads the new info  
17 into the Lawson database, we've heard testimony it  
18 doesn't happen all the time. In fact, we heard  
19 testimony that 90 percent or more of the systems are  
20 implemented by Lawson or they teach the customer how  
21 to load the catalog data. But, again, what does it  
22 matter who loads the catalog data? At the end of the  
23 day we're talking about a catalog database. And so  
24 we're looking at what's in the database. And if this  
25 data is in the database, it satisfies the Court's

1 definition. It doesn't really matter how it got there  
2 or if it was changed in any way, shape or form.

3 THE COURT: All right. How do you address  
4 Mr. McDonald's argument that instructing the jury as I  
5 have suggested is not right because it skews what the  
6 experts have done after the Court's claim construction  
7 opinion was issued?

8 MR. ROBERTSON: Quite, frankly, Your Honor,  
9 they did this at their own peril. They are the ones  
10 who created a new definition for "published" in order  
11 to conjure up a non-infringement argument. The Court  
12 didn't say that's what I meant by "published."

13 What they did is they looked at the  
14 definition. They recognized they were going to have a  
15 problem with it. So they came up with their own  
16 construction of published. And they did so at their  
17 own risk because it's not what the Court intended.  
18 It's not what was set forth, and it's not supported by  
19 the specification.

20 THE COURT: Is there any prohibition in the  
21 law of the Federal Circuit against a court instructing  
22 a jury on what the standard usual definition of a term  
23 in a patent claim is?

24 MR. ROBERTSON: No, not that I know of, Your  
25 Honor, particularly now when it's to dispute because

1 this whole position of Lawson has been revealed. I  
2 think it's entirely appropriate. I know of no case  
3 law that doesn't permit the Court to address an issue  
4 like this that's come up so we don't have all of this  
5 confusing and misreading information offered to the  
6 jury that has no relevance and yet is going to appear  
7 to have some significance when they go to do their  
8 deliberations.

9 THE COURT: All right. Thank you.

10 Do you have any other dictionary definition  
11 of "published" other than the one you offered in DX  
12 371?

13 MR. McDONALD: I have four dictionaries in  
14 the courtroom, Your Honor.

15 THE COURT: You have what?

16 MR. McDONALD: Four dictionaries in the  
17 courtroom.

18 THE COURT: Can you give me one of them? You  
19 have four copies of the same one?

20 MR. McDONALD: I very four different ones  
21 tabbed with the word "published" in them. Would you  
22 like me to hand them all up to you?

23 THE COURT: You cited Oxford English  
24 Dictionary in Defendant's 371.

25 MR. McDONALD: Right. And I have a pocket



1 version of the Oxford American, a paperback version  
2 here. It doesn't really matter to me which of these  
3 definitions are used for "published" because every one  
4 of them focuses on the idea of public dissemination of  
5 something, which is actually what the experts said,  
6 including even Dr. Weaver in his examination in this  
7 case. He talked about that that word uses the idea of  
8 public distribution or public sale.

9 And I've got two more here if you'd like to  
10 see those. I can read the American Heritage  
11 Dictionary, for example.

12 THE COURT: Merriam Webster, I think, is the  
13 one that I used to prepare the one I was proposing.

14 MR. McDONALD: Do you have that up with you  
15 right now?

16 THE COURT: Yes, I'm not sure it's the same  
17 edition. It says the new edition. Have you got more?

18 MR. McDONALD: Well, I thought you were going  
19 to read that one. Do you have the Webster? May I  
20 read that out loud so we've got it in the record?

21 THE COURT: I thought you were going to talk  
22 about it and so I was --

23 MR. McDONALD: I think we may be both waiting  
24 for each other, but I have the Random House Webster's  
25 dictionary, 4th edition, here that was just handed

1 back to me with "published" first meaning, to issue  
2 (printed or otherwise reproduced textual or graphic  
3 material) for sale, and (2) to make publicly or  
4 generally known. Those are the first two. And then  
5 there's a third one, to issue newspapers, books, etc  
6 and then fourth is to have one's work published.

7 And that's very typical of these other  
8 definitions.

9 THE COURT: American Heritage, 4th edition,  
10 says, No. 1, To prepare an issue (printed material).  
11 For public distribution or sale. (2) To bring to the  
12 public attention, announce.

13 The Merriam Webster New Edition says, "To  
14 make generally known, announce publicly." Second one,  
15 "To produce or release literature, information,  
16 musical scores or sometimes recordings or art for sale  
17 to the public."

18 The Pocket Oxford American Dictionary, did  
19 y'all bring these with you or did you stimulate  
20 business --

21 MR. McDONALD: This was stimulated in  
22 Richmond, Virginia, local economy, Your Honor.

23 THE COURT: The first one is "Prepare and  
24 issue a book, newspaper, piece of music for public  
25 sale, print something." (2) "Print something in a

1 book, newspaper or journal as to make it generally  
2 known." (3) "Formally announce to read an edict or a  
3 marriage ban."

4 MR. McDONALD: That last one, I don't think  
5 we're using that last one about marriage.

6 THE COURT: I don't think that works, but  
7 basically I think the way I've defined "published"  
8 catches these, doesn't it?

9 MR. McDONALD: The problem I have, Your  
10 Honor, that I don't think it does is when you've got  
11 to make generally known, I think that should be  
12 publicly to be consistent with these as well as Dr.  
13 Weaver and the experts. So I would change the word  
14 "generally" to "publicly." And then we've got that  
15 phrase "or to disclose," which doesn't have any sort  
16 of a public or sale related aspect to it.

17 So I would say that should be eliminated  
18 entirely from it. I think it's very accurate to say  
19 "published" simply means to make publicly known.

20 THE COURT: I'll take those dictionaries, and  
21 I'll give you back yours, but I'll just take all of  
22 them and look at them and frame something. I think  
23 "disclosed" needs to be in there, but I'm not sure.

24 MR. ROBERTSON: Your Honor, may I address  
25 this "publicly" now a new term has been injected? I

1 think generally known was in several of the  
2 dictionaries that you indicated. I think that's more  
3 appropriate.

4 Remember, "published" still has to be read in  
5 context of the patent, and we're talking about  
6 electronic data here. So when you take electronic  
7 data, and you put it in a vendor catalog database,  
8 you're not making something publicly known, you're  
9 just taking that data that has been made generally  
10 known or disclosed by the vendor, and then you're  
11 loading it into the database.

12 Now, who does that loading or how it's  
13 modified in any way is not relevant to "generally  
14 known" or "disclose."

15 Publicly now would suddenly become another  
16 non-infringement gotcha that we've been talking about.

17 THE COURT: Well, go ahead, Mr. McDonald.

18 MR. McDONALD: Okay.

19 THE COURT: Anything else?

20 MR. McDONALD: Your Honor, just to be clear  
21 as well, speaking of gotchas, as Mr. Robertson said,  
22 basically, he's the one that's trying to turn this  
23 into a gotcha. I'm fine going to the jury on a fair  
24 and ordinary meaning. He's the one who is trying to  
25 say, "I can't even present evidence anymore on these

1 issues of how the accused database, the item master,  
2 came into being."

3           These are clearly facts that are relevant  
4 here. What if the vendor was the one who had selected  
5 the desired items and added the information and  
6 deleted the items and modified? Obviously, that would  
7 be relevant. So the fact that somebody else does it  
8 is also relevant to the converse.

9           And so he's the one that's trying to do the  
10 gotcha here and preclude us from even being able to  
11 present our case to the jury here by saying none of  
12 this evidence that Lawson wants to present is even  
13 relevant here. That's where the gotcha is coming in.  
14 So Mr. Robertson is the one who keeps saying we  
15 shouldn't use these claim constructions --

16           THE COURT: Why should this come in into  
17 evidence? You want to argue that it's not a catalog  
18 because the customer of Lawson in the instance where  
19 it's using a legacy system, for example, has pulled  
20 from a bunch of catalogs things that it put together,  
21 and you flipped it into the system when you into the  
22 Lawson system. And somehow that information doesn't  
23 constitute information that's published by a vendor  
24 merely because it's gone through a relocation.

25           And that's not what the claim construction

1 says. And that's not a fair reading of the patent.  
2 So maybe he's right that none of this comes in, that  
3 to the extent it is relevant, it's only marginally  
4 relevant, and it's too confusing to the jury to have  
5 to sort through all of this who put the material into  
6 the system, the structure that you all have  
7 constructed, that is the Lawson system.

8 MR. McDONALD: But we're talking about the  
9 item master as being the thing that's being accused as  
10 being multiple catalogs, Your Honor, and I think as a  
11 fact matter, we should be able to show that doesn't  
12 satisfy this definition. The definition starts off by  
13 talking about an organized collection. That's the  
14 noun here. And then it goes on to say that's why it  
15 has to be published by a vendor. And that's very  
16 consistent with the patent. Any other way is  
17 inconsistent.

18 THE COURT: I'm going to tell you now that  
19 you're not free to argue simply that -- you just  
20 argued that the only thing that's covered by the claim  
21 construction is a Sears catalog that is put into the  
22 system. And if that's what your theory is, you lose.  
23 And I'm going to find that you lose as a matter of law  
24 because that isn't what it's all about.

25 And I think if that's what you're trying to

1 do, then I think the answer is that Rule 403 keeps  
2 that whole line of evidence out. If that's what  
3 you're thinking, forget it, because it ain't going to  
4 happen. If you argue that in front of the jury, I'm  
5 going to tell the jury that that isn't permissible and  
6 I'll sustain a motion to strike it because it never  
7 was intended to do that.

8 We may not have done the best job of claim  
9 construction here. I don't know. But in any event,  
10 whatever is going to happen is that we're not going to  
11 convert this into something that it wasn't and is not  
12 reasonably intended.

13 MR. McDONALD: You have that Markman  
14 transcript, and if you take a look at that, you'll see  
15 that I was definitely talking about the issue that we  
16 have to have a definition that's consistent with the  
17 patent and consistent with the ordinary meaning of  
18 catalog that will exclude something like a shopping  
19 list or a list of products somebody buys instead of  
20 something somebody sells. That was all on the table  
21 at the Markman.

22 And if we go too far the other way with the  
23 definition, Your Honor, I think we start grabbing  
24 things within the catalog definition that would not be  
25 considered within the ordinary meaning. It would be

1 inconsistent --

2 THE COURT: Everything that your customers  
3 look for is something that a vendor sells because what  
4 happens is when they use your system, your customer  
5 goes to buy it from the vendor who is selling it to  
6 them, and a requisition is made, a purchase order is  
7 made, and it goes to the vendor, and that's a typical  
8 sale, isn't it? It's a sale purchase. That's what it  
9 is.

10 MR. McDONALD: The point is what's a catalog  
11 and what's not. That's what I'm talking about, and  
12 the shopping list is not a catalog. If I come up with  
13 a list of requisition items that I want to buy, that's  
14 not a catalog. That's not how these patents use that.  
15 They call them requisitions. They call them purchase  
16 orders. They call them something different from a  
17 catalog. And that's my concern that if we go too far  
18 on reconstructing the construction, that it's going to  
19 lead the jury to --

20 THE COURT: You reconstructing the  
21 construction, I think. So anyway I think what I'm  
22 going to do is instruct the jury. And the question  
23 then is: On what the ordinary meaning is, do you know  
24 of any case that says the Court can't instruct them on  
25 what the ordinary meaning is?



1 MR. McDONALD: I'm not sure. We'll have to  
2 look for that, Your Honor. I'm not an aware of any  
3 case at this point.

4 THE COURT: I don't know why it wouldn't be  
5 appropriate if there's a dispute about it. And you're  
6 offering Defendant's 371. I assume you did it in good  
7 faith believing that it was appropriate to do that.  
8 So I think I'm going to give it. I'm going to look at  
9 these definitions, if you don't mind loaning me your  
10 books for the evening.

11 Now, the real issue is: Can you ask these  
12 questions? Why is it that this approach as shown in  
13 item information changes, which I think Mr. Robertson  
14 just read into the record in its entirety in the first  
15 three blocks, I don't know that you read the last  
16 three -- the last block. It says, "Customer loads new  
17 info into Lawson database." And then it goes to item  
18 location, item master, and vendor item. I think  
19 that's now the whole thing is in the record.

20 But what difference does it make about  
21 whether the vendor changes the information to the new  
22 electronic format?

23 MR. McDONALD: Because we're showing the  
24 distance between when this thing actually was anything  
25 that even resembles a catalog at the vendor end and

1 how really when we get it isn't really necessarily  
2 corresponding to a catalog. It's a set of electronic  
3 data.

4 THE COURT: Where did it come from?

5 MR. McDONALD: It either comes from a legacy  
6 system or a vendor.

7 THE COURT: Where does what the vendor  
8 changed come from?

9 MR. McDONALD: That would typically be  
10 information consistent with the agreement that they  
11 have reached specific with that Lawson customer about  
12 the particular items. It's the particular items they  
13 have agreed to, which may be just a handful of items  
14 that have their own personal private price that they  
15 have negotiated, a discount price that is not  
16 available elsewhere, that neither vendor nor customer  
17 wants others to see. They keep it secure. It is not  
18 the same thing even at that initial step.

19 THE COURT: Where did it come from?

20 MR. McDONALD: It came from the agreement  
21 between the vendor and the customer.

22 THE COURT: No. That's where -- it's got to  
23 come from somewhere before they agree on it. Where  
24 did it come from before then?

25 MR. McDONALD: Why does it have to come from

1     someplace before they agree on it?

2             THE COURT:   Where does it come from before  
3     they agree on it?

4             MR. McDONALD:   I'm sorry?

5             THE COURT:   Where does this information that  
6     they put in the list come from before they agree on  
7     it?

8             MR. McDONALD:   Well, the price is an agreed  
9     price, so I don't know if that existed before, and  
10    certainly there's product information that could  
11    preexist and come from the vendor.   So it's a  
12    combination --

13            THE COURT:   It comes from the vendor where?  
14    It comes from a catalog in the vendor, right?

15            MR. McDONALD:   That's not what the evidence  
16    is, Your Honor.

17            THE COURT:   They take it and they say, Well,  
18    I want all of this information from the catalog or I  
19    only want 8,000 entries.   And I'm putting the 8,000  
20    entries into my legacy system, for example.   That's  
21    one of the examples that somebody gave.   Or 15  
22    entries.

23            MR. McDONALD:   Well, it's a very selective  
24    process, Your Honor, and it's a fact issue, I think,  
25    is our point here.   That's a record we should be

1 entitled to make as to how that item master comes  
2 about. That's the accused device. We think that the  
3 facts related to how that item master comes about are  
4 really relevant here, and we should be entitled to  
5 present those facts to the jury and let them decide  
6 and apply that ordinary meaning as the Court has given  
7 it to them as to what catalogs are.

8 THE COURT: All right. Anything else?

9 MR. ROBERTSON: Yes, Your Honor, I just want  
10 to make one point. And that is, if you look at your  
11 definition, for example, it says one of the things  
12 that preferably needs to be included is price, for  
13 example.

14 Now, Mr. McDonald just made an argument,  
15 Well, this could be a negotiated price between the  
16 vendor and the customer. Again, where does it say  
17 that it has to be negotiated or it has to be the list  
18 price? This is illustrative of the point. The claim  
19 is silent on that. You just to have a price, for  
20 example.

21 So whether it was negotiated or whether it  
22 was the list price is the perfect example that you  
23 shouldn't be reading those kind of things into the  
24 claim construction. Thank you.

25 THE COURT: All right. Well, I think this:

1 I've reflected. I've read the claim construction  
2 opinion, and I've reviewed the transcript parts that  
3 you have cited, and a couple others that you didn't  
4 cite but that you pointed me to. And I've read the  
5 patent claims again and the glossary of terms, and I  
6 believe that it is appropriate for the Court to  
7 instruct the jury on the ordinary and usual meaning of  
8 "published by a vendor" to one of ordinary skill in  
9 the art.

10 Nobody says it's any different than the  
11 standard dictionary definitions. That is, that nobody  
12 says a person of ordinary skill in the art would use  
13 anything other than the standard dictionary  
14 definitions. In fact, DX 371, which Lawson offered,  
15 is a standard dictionary definition, and it is one of  
16 the definitions I used to prepare the draft that I've  
17 given to you all and has been read into the record.

18 That said, I believe that Lawson is entitled  
19 to attempt to show that the way its system is used  
20 doesn't fit any of the definitions, and that the  
21 functional effect of the claim, excuse me, it doesn't  
22 fit the claim, excuse me, and the functional effect of  
23 precluding all that evidence is to deprive them of  
24 that right.

25 And so I'm going to allow them to introduce

1 this testimony, but I'm also going to assess at the  
2 end of the case and the end of all the evidence  
3 whether a Rule 50 motion is appropriate after I hear  
4 it all because I believe that what I'm hearing is a  
5 fairly ephemeral argument, and it may be that the  
6 witnesses can suggest otherwise, but it may very well  
7 be that at the end of the day, I'll have to do  
8 something else about this.

9 But for now, that's how we'll proceed.

10 MR. ROBERTSON: Your Honor, could I just ask  
11 for some guidance then?

12 THE COURT: Can you ask for what?

13 MR. ROBERTSON: For some guidance from the  
14 Court. Because this is going to come up often  
15 throughout the testimony with Mr. Christopherson,  
16 perhaps Mr. Lohkamp, and even Dr. Shamos. And to  
17 protect the record, I'm going to have to object each  
18 time as irrelevant.

19 And I understand Your Honor's ruling. I  
20 don't want to disrupt the proceedings, but given Your  
21 Honor's ruling, does Your Honor still think I need to  
22 protect the record or can we rely on the fact that  
23 Your Honor has indicated you're going to permit this  
24 type of testimony?

25 THE COURT: I'm going to permit some of this

1 testimony, and you're going to have to deal with it on  
2 a question by question basis. My belief is that if  
3 the question is nothing more than how do you could  
4 this and how do you do that, who selects it, if the  
5 only part of the question is those things that are set  
6 forth in this item information changes slide, you've  
7 already made your objections to that.

8           What you ought to do is object to it on the  
9 record, and I'll overrule it, and you can ask for a  
10 continuing objection to the extent that the questions  
11 are confined just to this. But you have to keep your  
12 ears and eyes open because it's not right for them,  
13 for the Court of Appeals or anybody else for you to be  
14 able to have a general floating objection which you  
15 assert only after you are on appeal.

16           If it's the same kind of question, your  
17 objection will stand.

18           MR. ROBERTSON: My concern, Your Honor, is  
19 that I am going to be repeatedly objecting and the  
20 Court is going to be repeatedly overruling suggesting  
21 to the jury that the questions are entirely proper in  
22 the context, and therefore they are satisfying the  
23 claim language at the end of the case. It puts  
24 significant prejudice to ePlus to be put in that  
25 position.

1 THE COURT: To be put in the position of  
2 trying cases in the usual and standard way? Come one,  
3 Mr. Robertson. Besides that, I don't think you  
4 listened. I said you have to listen to the questions.  
5 And if the questions are of the ilk that are set forth  
6 in this slide, then you can make your objection the  
7 first time and say, Can I have a standing objection to  
8 these. And I'll say yes.

9 But if the question is different, you have to  
10 get up and object to it because it may not be  
11 something that is covered within the ruling that I've  
12 made.

13 MR. ROBERTSON: I think I understand the  
14 Court now.

15 THE COURT: That's what I hoped I said.

16 All right. Now, the other thing that I have  
17 is does the ruling that was made earlier in answering  
18 question 4 also dispose of this motion -- well, excuse  
19 me. I've put it somewhere.

20 EPlus, Inc.'s motion to preclude evidence or  
21 argument of non-infringement due to defendant's  
22 failure to provide discovery relating to customer  
23 specific implementations of accused product modules.  
24 I kept the evidence out because what they -- they  
25 don't have any business deciding this case as a



1 discovery sanctioning. That's essentially what that  
2 question was aimed at.

3 I'm not sure it disposes of this issue, the  
4 ruling disposes of this issue.

5 MR. ROBERTSON: Your Honor, I haven't had --  
6 this arose after the lunch break. I haven't had an  
7 opportunity to go back and look at exhibits A and B,  
8 but I've spoken to some of my colleagues. And  
9 Exhibits A and B were aimed at revenues associated  
10 with certain modules. It didn't answer the questions  
11 that were asked in that.

12 I need to go back and look at it and I'll  
13 report to the Court promptly in the morning.

14 THE COURT: All right. That's fine. Now I  
15 know where I stand.

16 MR. SCHULTZ: In addition to Appendix A, B,  
17 we were also talking about C and D. There are four  
18 exhibits and appendices that were attached --

19 THE COURT: Mr. Schultz, you just keep adding  
20 stuff.

21 MR. SCHULTZ: No.

22 MR. McDONALD: We'll do a written response,  
23 Your Honor, and try to summarize --

24 THE COURT: What?

25 MR. McDONALD: We would do a written

1 response. I'm not sure if I hear Mr. Robertson when  
2 he says he's going to review the papers overnight, are  
3 you considering withdrawing the motion?

4 MR. ROBERTSON: I have to review the papers.  
5 Then I would consider it if in fact --

6 THE COURT: That's all he's asking was is one  
7 of the purposes of you review considering whether to  
8 withdraw the motion? That's all he was asking.

9 MR. ROBERTSON: Yes.

10 THE COURT: Easy big fellow.

11 MR. ROBERTSON: Yes.

12 MR. McDONALD: If that's the case, Your  
13 Honor, we'll hold off on filing a responsive briefing  
14 until we find out if it's really necessary.  
15 Obviously, especially when we use the word "appendix,"  
16 I think it's something you have to lift that's pretty  
17 heavy.

18 So we'll hold off on that until we know we  
19 really have to respond to it.

20 THE COURT: When are you going to be putting  
21 this evidence in?

22 MR. McDONALD: I don't think it's coming in.  
23 They have already taken their testimony on  
24 implementation. And it's really not an issue we're  
25 disputing.

1 THE COURT: In other words, it's not going to  
2 be implicated in the testimony of your witnesses?

3 MR. McDONALD: Not in the foreseeable future.  
4 I can't think of who that would even apply to going  
5 forward.

6 THE COURT: So you're going to wait and see  
7 who it is you make stay here this weekend and work.

8 MR. McDONALD: Well, I know the answer to  
9 that question.

10 THE COURT: All right. Anything else that we  
11 need? Are we going to be ready to go? Who have we  
12 got tomorrow?

13 MR. McDONALD: Dale Christopherson is first.  
14 We'll make sure he keeps the handcuffs on him and he  
15 doesn't leave the county. We have Hannah Raleigh  
16 here. I think we are all set. The glitches we had  
17 have been taken care of.

18 We have another issue or two about some  
19 witnesses. I'll just talk to opposing counsel about  
20 that before I bring it up to the Court.

21 THE COURT: Now, you will be projecting to be  
22 finished on the 25<sup>th</sup> of January, which is -- wait a  
23 minute.

24 THE CLERK: Tuesday, the 25<sup>th</sup>.

25 THE COURT: Sorry. You will have all day.

1 You have tomorrow, which is what? Friday?

2 MR. McDONALD: Thursday.

3 THE COURT: Thursday and Friday. So you have  
4 those two days. Then you have the 18th and the 19th,  
5 which are four days. Then you have the 20th, which is  
6 the fifth day. Do you expect to be finished on the  
7 afternoon of the 20th.

8 MR. McDONALD: Yes.

9 THE COURT: You know basically what -- have  
10 you given them a list of who you're calling in your  
11 case?

12 MR. McDONALD: Yes.

13 THE COURT: And you know who they are  
14 calling. You have a pretty good idea. How long a  
15 rebuttal case do you see? And I'm not going to hold  
16 either one of you, I mean, absolutely. I think we  
17 have events such as occurred today that affect what  
18 we're doing, and we'll have to deal with what's fair  
19 and right, but I'm trying to get some scheduling  
20 information.

21 How long do you think your rebuttal case is?

22 MR. ROBERTSON: About four to five hours.

23 THE COURT: So you expect to be finished, if  
24 he finishes up on Thursday, the 20th, you'll be  
25 finished on the evening of the 24th at the latest?

1 MR. ROBERTSON: Yes, sir.

2 THE COURT: I have revised the instructions,  
3 and I'm going to work on them again this weekend. I  
4 haven't had a chance. And I've taken what you've done  
5 and looked at them and tried to simplify them some.  
6 And you-all, for example, put some things about the  
7 doctrine of equivalents in that I don't think have  
8 applicability. At least I didn't hear anybody testify  
9 about it. So we need to get that straight.

10 So we'll do the instructions Friday and maybe  
11 Saturday the 21<sup>st</sup>, and go to the jury on Monday the  
12 24th is what I hope we're shooting for.

13 If we have an earlier schedule than that,  
14 we'll just have to flex and deal with what we've got.  
15 We may need it. But I'm going to get the instructions  
16 to you the first part of the week, so that you'll have  
17 them and can go through them.

18 They don't vary a great deal from what  
19 you-all have done. Is there anything that Judge  
20 Spencer did in the SAP trial, is there any change in  
21 the law, Mr. Robertson, that you see that affects the  
22 instructions he used?

23 MR. ROBERTSON: Yes, sir, there is. There is  
24 the Supreme Court decision in KSR, and so I think we  
25 have put in the model instruction from -- I'm sorry.

1 And there's also a case called SEB from the Federal  
2 Circuit which has to do with the standard of intent  
3 for the inducement infringement, which I understand  
4 also includes a reckless disregard for the patent.

5 THE COURT: I want you to give Ms. Haggard  
6 the citations for those two cases, plus --

7 MR. ROBERTSON: Let me be candid with the  
8 Court.

9 THE COURT: What is it?

10 MR. McDONALD: Akamai.

11 THE COURT: Alkamai?

12 MR. ROBERTSON: Alkamai is how it's  
13 pronounced.

14 THE COURT: I can't pronounce it. All right.  
15 I want you to give her the cites, so I make sure I've  
16 read those while I'm working on the instructions.

17 MR. ROBERTSON: The Supreme Court has granted  
18 a writ of certiorari with respect to this SAB case I  
19 just referenced. But the Federal Circuit just came  
20 down with a case I think in the last week that said  
21 that the pendency of a writ of certiorari has no  
22 impact whatsoever on what the state of the law is.

23 THE COURT: Why did the Federal Circuit feel  
24 compelled to decide that? I think that's been the law  
25 forever.

1           MR. ROBERTSON: I think it was because one of  
2 the litigants made the argument.

3           THE COURT: I understood that to be the case  
4 for as long as I've been practicing law.

5           MR. ROBERTSON: All right. Thank you, Your  
6 Honor.

7           THE COURT: All right. Thank you all very  
8 much. Give the citations to her tonight so she can  
9 print those out for me. Give her the books and we'll  
10 be ready to go.

11           Thank you very much.

12

13           (The proceedings were adjourned at 5:34 p.m.)

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